88-495

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HERBERT ROBERTS and JOAN ROBERTS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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950P

QUESTIONS PRESENTED

1. Does the good faith exception to the exclusionary rule apply to pre-indictment motions under Rule 41(e), Fed.R. Crim. P., which rule explicitly requires suppression of illegally seized evidence?

2. Did the court of appeals' circumvention of the plain language and meaning of Rule 41(e), in applying the good-faith exception, conflict with the decisions of this Court governing statutory construction?

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Opinions Below

The opinion of the court of appeals (App. A, infra) is not reported.[1] The opinion of the district court (App. B, infra) is reported at 656 F. Supp. 929. The opinion of the district court on the motion for reconsideration (App. C, infra) is reported at 675 F.Supp. 108.

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1. The parties to the court of appeals proceeding were: Petitioners-Appellees - Herbert Roberts, Joan Roberts and Lewis Bromberg; Respondent-Appellant - United States of America. Counsel for Lewis Bromberg has filed an application for an extension of time within which to file a petition for a writ of certiorari.

Jurisdiction

The judgment of the court of appeals was entered on July 21, 1988; the jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

Statute Involved

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> (e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in

> evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Statement

On May 27, 1986, a federal magistrate issued a search warrant authorizing the search of "Business Premises of Transnational Supply Warehouse, Inc., d/b/a 'National Supply Warehouse', 31 E. 31st Street, 1st Floor, New York, NY."

On the same date, U.S. Postal Inspectors executed the search warrant upon the premises of "Statewide Office Supply" at that address.

"The warrant concededly encompassed every business record that could be found on the premises . . . ." (App. A, p.4a).

During July, 1986, Herbert Roberts, Joan Roberts, and Lewis Bromberg

(hereinafter "Petitioners")[1] moved in the District Court for the Southern District of New York for an order under Fed. R. Crim.P.41(e), directing that the seized records be returned to them on the ground that the seizure violated the Fourth Amendment's prohibition of unreasonable searches and seizures.

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1. Herbert Roberts was the president of Statewide and ex-president of Transnational. Lewis Bromberg was Statewide's secretary and vice-president. Joan Roberts was the president and sole shareholder of a company called M.I.S.S., Inc. All three individuals operated from the storefront labeled "Statewide," which was the premises searched during the execution of the Transnational warrant.

Petitioners contended that the search warrant did not authorize the search of Statewide's premises, that it was an impermissible general warrant, and that the warrant was insufficiently particular with respect to the place to be searched. Petitioners also requested that the court unseal the affidavit in support of the warrant, to enable them to test its showing of probable cause.

In a Memorandum Opinion and Order issued on March 13, 1987, District Judge Robert W. Sweet ruled that the warrant was a facially-invalid general warrant; and that even if facially valid, the warrant was not, with respect to most of the seized items, supported by probable cause. The district court further held that the good-faith exception to the exclusionary rule (United States v. Leon,

468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984)) and the inevitable-discovery doctrine (Nix v. Williams, 467 U.S. 431 (1984)) could not be applied to the pre-indictment Rule 41(e) motion because of the rule's express suppression requirement.

Consequently, the district court directed the return and suppression of the documents seized, excepting two groups of documents for which it found the affidavit to establish probable cause

justifying seizure.[1] (App. B, p. 51a).

On June 15, 1987, the government moved for reconsideration, arguing for application of the good-faith, inevitable discovery and plain view justifications for its illegal search and seizure.

On November 25, 1987, the district court issued a Memorandum Opinion denying

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1. The district court stated the reasons for its determination that the affidavit did not establish probable cause in a separate sealed opinion, dated March 13, 1987. See Roberts v. United States, supra, 656 F.Supp. at 935-36. On appeal, the government did not challenge the finding that probable cause was lacking with regard to the vast majority of seized items.

the government's motion for reconsideration. (App. C).

On July 21, 1988, the court of appeals reversed the district court's grant of the Rule 41(e) motion, holding that the judicially-created exceptions to the exclusionary rule do apply to motions under Rule 41(e), Fed.R.Crim.P.[1]

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1. The court of appeals rejected, factually, the government's claims for application of the inevitable discovery exception and the plain-view doctrine, and remanded to the district court for findings of fact on the issue of whether the executing officers' reliance on the warrant was objectively reasonable under Leon.

Reasons for Granting the Petition

This case presents an important question of federal criminal law deserving of attention by this Court: whether the judicially created good faith exception to the "judicially implied"[1] Fourth Amendment exclusionary remedy applies to a pre-indictment motion made under Rule 41(e) of the Fed.R.Crim.P. which by its terms expressly requires suppression of illegally seized property.

In addition to its intrinsic significance, this issue requires the attention of this Court in order to remedy the court of appeals' improper use of historical analysis to avoid the plain language of Rule 41(e).

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1. Mapp v. Ohio, 367 U.S. 643, 648 (1961).

As this Court has repeatedly observed, the starting point of statutory construction is the statute itself. Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

The Federal Rules of Criminal Procedure, propounded pursuant to the authority granted this Court under 18 U.S.C. §687 (1946 ed.) (currently codified, as amended, at 18 U.S.C. §3771), are, "in every pertinent respect, as binding as any statute duly enacted by Congress and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions." The Bank of Nova Scotia v. United States,

56 U.S.L.W. 4714, 4715 (June 22, 1988) (addressing Rule 52).

Rule 41(e) sets out three substantive criteria for a successful application. First, the movant must be a "person aggrieved" by an unlawful search and seizure. Second, the seizure of the property sought to be returned must have been "illegal," and third, the movant must be entitled to lawful possession of the property. If these criteria are met, the rule provides an unqualified mandatory remedy: ". . . the property shall be restored and it shall not be admissible in evidence at any hearing or trial."

The government has conceded the absence of probable cause to seize most of the documents. Thus, as to those documents, the search and seizure

violated petitioners' Fourth Amendment rights; the seizure was "illegal."[1]

Avoiding the plain mandate of Rule 41(e) that suppression of the seized property must follow a determination of illegality, the court of appeals, relying on analysis of the Notes of the Advisory Committee on Rules and on decisional authority, interpreted the Rule's plain language as incorporating, sub silentio, the judicially evolved exceptions to the judicially crafted exclusionary rule.

This Court's review is necessary to determine whether the court of appeals' judicial legislation, achieved by

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1. The petitioners' status as "persons aggrieved" and their entitlement to lawful possession of their property were not challenged on appeal.

flouting important doctrines of statutory construction and resulting in the evisceration of the distinction between legislated versus judicially-evolved exclusionary rules, was desirable or appropriate in either means or end.

The court of appeals' judicial modification of the Rule conflicts with numerous decisions of this Court holding that the plain meaning of a statute must control absent a clearly expressed legislative intention to the contrary. North Dakota v. United States, 460 U.S. 300, 312 (1983); Garcia v. United States 469 U.S. 70, 75 (1984) (when the terms of a statute are unambiguous, judicial inquiry is complete; "only the most extraordinary showing of contrary intentions would justify a limitation on the 'plain meaning' of the statutory

language"); see also, Bourjaily v. United States, ____U.S.____, 55 U.S.L.W. 4962, 4964 (1987) ("It would be extraordinary to require legislative history to confirm the plain meaning of Rule 104 . . . we think that the Rule is sufficiently clear that . . . the Rule prevails." (footnote omitted) (emphasis in original)); Rodriguez v. United States, ___ U.S. ___, 55 U.S.L.W. 3641, 3642 (1987) (per curiam) (where "the language of a provision is sufficiently clear in its context and not at odds with the legislative history, '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'" (citations omitted)); Schiavone v. Fortune, 106 S.Ct.2379 (1986) (courts must follow "plain language" of

Fed.R.Civ.P. 15 (c); "accept the Rule as meaning what it says").

The unambiguous imperative language of Rule 41(e) compels return and suppression of property illegally seized. The history of Rule 41(e) is bereft of any expressed legislative intent to engraft upon the clear remedial language of the Rule, unchanged since 1946, existing judicial exceptions to the exclusionary rule, much less the Leon exception which did not come into being until well after the last substantive

amendment of the Rule in 1979.[1]

Additionally, review is warranted to

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1. To be sure, Rule 41(e) was originally intended to incorporate prior existing law, both as to standing, and as to substantive exclusionary law. Advisory Committee Note on Rule 41 of the Fed.R.Crim.P., 4 F.R.D. 428 (1946). Similarly, the 1972 amendment, introducing the term "illegally seized," was intended to create an elastic standard capable of accomodating future evolutions in substantive search and seizure law. Thus, while the substantive criteria of the rule were altered, the remedy itself remained intact. Of course, the existence of a substantive Fourth Amendment violation is conceptually distinct from the remedy for that violation. United States v. Leon, supra, 468 U.S. at 906; Illinois v. Gates, 462 U.S. 213 (1983). Rule 41(e) was most recently amended in 1987, but "[n]o substantive change [was] intended." See Rule 41, Notes of Advisory Committee on Rules.

rectify a misapplication by the lower court of a decision of this Court. In its attempt to find support for its rejection of "the District Court's . . . assumption that the express textual mandates of the Federal Rules of Criminal Procedure take precedence over the decisional law which created the exclusionary rule . . ." (App. A, p. 7a) (footnote omitted), the court of appeals misapplied dictum from this Court's decision in United States v. Calandra, 414 U.S. 338 (1974).

In Calandra, this Court considered an application of the exclusionary rule. A lower court's determination with respect to a Rule 41(e) application was not under review by this Court. Against this setting, the Court noted, in its only reference to Rule 41(e), that while the

court of appeals had only considered standing under Rule 41(e), the standing requirement is the same for both remedies.

The court of appeals wrested from this context the following sentence: "Rule 41(e) . . . does not constitute a statutory expansion of the exclusionary rule." (App. A, p. 7a), quoting from 414 U.S. at 348 n.6), and found therein direct support for its rejection of the express textual mandate of the rule. Ironically, this Court's need to address this issue of standing in Calandra evidences the existence of the two distinct remedies,

judicial and statutory.[1]

The misreading of the footnote in

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1. This Court has acknowledged that exclusionary rules have been recognized in different contexts, "in a number of areas . . . where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure." United States v. Blue, 384 U.S. 251, 255 (1966) (emphasis added); compare, Jones v. United States, supra, 362 U.S. 257 (describing Rule 41(e) as "a statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search") (emphasis added), with United States v. Calandra, supra, 414 U.S. at 571 (describing the exclusionary rule as "a judicially created remedy, designed to safeguard Fourth Amendment rights generally") (emphasis added).

Calandra is also found in the Advisory Committee's Notes in connection with currently proposed amendments to Rule 41(e), 120 F.R.D. 428 (1988). These amendments (see id., at 426-27), which would remove the evidentiary aspect of the rule, are founded in the recognition that the exclusionary "language has not kept pace with the development of exclusionary rule doctrine and is currently only confusing." Id. at 427-28.

This "confus[ion]" exists only because of a reluctance by the court of appeals to accept the present clear mandate of Rule 41(e). It may, or may not, be resolved by prospective amendment to the Rule. For now, however, it is mischievous error for the lower court to tamper with the plain meaning of a rule, and to declare that it does not mean what it says. For

this reason, too, review is warranted of the circuit court's decision.

Finally, it bears mention that application of the express mandate of Rule 41(e) will not affect the exceptions to the exclusionary rule as they pertain to criminal defendants. A suppression motion under Rule 12(b), or post-indictment[1] Rule 41(e) motion require application of the exclusionary rule as developed by this Court in Fourth Amendment caselaw. The independent origins of these two exclusionary rules suggest that application of each will necessarily

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1. Under Rule 41(e), a post-indictment motion is treated as a Rule 12(b) motion.

engender disparate results relative to their respective contexts.[1]

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1. For example, the court of appeal's finding that Rule 41(e)'s remedy is co-extensive with the judicial exclusionary rule cannot be reconciled with Rule 41(e)'s provision that its remedy applies only to property that is not contraband, while the judicial exclusionary rule does apply to contraband. Similarly, it has been held that Rule 41(e)'s remedy does not apply to telephone conversations. United States v. Vigorito, 499 F.2d 1351, 1355 (2d Cir.), cert. denied, 419 U.S. 1056 (1974). Not so the judicial exclusionary rule which extends the protection of the Fourth Amendment to seizures of intangibles. Katz v. United States, 389 U.S. 347, 353 (1967).

Application of the remedy provided by Rule 41(e) will affect only cases involving persons who are not indicted, a just result. See In re Motion for Return of Property, 681 F. Supp. 677 (D. Hawaii 1988).

In light of the clear language and unilluminating legislative history of

Rule 41(e),[1] the issues herein distill to whether this Court is willing to

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1. Actually, there are indications that support the firm application of the rule's express mandate. The conclusion that a general suppression remedy was intended for Rule 41(e), with express statutory exceptions the only deviation, can be drawn from a 1977 amendment to Rule 41 specifically stating such an exception: "Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under [Rule 41(c)(2)] is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit." Rule 41(c)(2)(G). See Russello v. United States 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," quoting, United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)); accord Rodriquez v. United States, supra, 94 L.Ed.2d at 3642.

encourage the courts of appeals "to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended." Garcia v. United States, supra, 469 U.S. 70, 78. At bottom, the broad remedial language of Rule 41(e) should not be "clipped" for the simple reason that the drafters "did not write the statute that way." Id. at 79.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1009—August Term, 1987

(Argued June 1, 1988 Decided July 21, 1988)

Docket No. 87-1547

UNITED STATES OF AMERICA,

Respondent-Appellant,

—against—

HERBERT ROBERTS, JOAN ROBERTS, and LEWIS BROMBERG,

Petitioners-Appellees.

Before:

KAUFMAN, MINER, *Circuit Judges*, and CONNER, *District Judge.**

* Hon. William C. Conner, Senior District Judge, United States District Court for the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, pursuant to Rule 41(e), Fed. R. Crim. P., directing that the government return certain business records to appellees.

Reversed and remanded.

BARUCH WEISS, Assistant United States Attorney, New York, N.Y. (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Aaron R. Marcu, Assistant United States Attorney, New York, N.Y., of counsel), *for Respondent-Appellant*.

JACOB LAUFER, New York, N.Y. (Patricia M. Karish, Laufer & Farkash, New York, N.Y., of counsel), *for Petitioners-Appellees Herbert Roberts and Joan Roberts*.

COLLEEN P. CASSIDY, New York, N.Y. (The Legal Aid Society, Federal Defender Services Unit, New York, N.Y., of counsel), *for Petitioner-Appellee Lewis Bromberg*.

CONNER, *District Judge*:

The United States of America appeals from an order of the United States District Court for the Southern District of New York (Hon. Robert W. Sweet, Judge), directing

that appellees' seized business records be returned and suppressed pursuant to Rule 41(e), Fed. R. Civ. P.[1] *Roberts v. United States*, 656 F. Supp. 929 (S.D.N.Y. 1987). The District Judge ruled that the search warrant on which the seizure was based was so sweeping as to be a "general" warrant violating the particularity requirement of the fourth amendment; that there was no probable cause to support a warrant to search for most of the documents seized; and that the exceptions to the exclusionary rule do not apply to Rule 41(e) motions. We reverse and remand.

The search warrant in question was issued by United States Magistrate Leonard Bernikow in connection with a grand jury investigation into suspected commercial bribery of corporate purchasing agents by stationery suppliers. The warrant authorized the search of the premises of appellees' stationery distributing business, "Transnational Supply Warehouse, Inc., d/b/a 'National Supply Warehouse,' 31 E. 31st Street, 1st Floor, New York, NY," and the seizure of numerous categories of business records.[2]

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1 Rule 41(e) provides in pertinent part:

> A person aggrieved by an unlawful search and seizure may move . . . for the return of the [seized] property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

2 The warrant directed the seizure of the following items:

> Customer Files, Customer Lists, Lead Source Material, Invoices, Purchase Orders, Order Forms, Lead Cards, Sales Pitch Sheets, Price Lists, Cassettes Containing Sales Pitches, Personnel Files, Employment and Payroll Records, Financial Records, Ledgers, Cash Disbursements and Cash Receipts Journals and Ledgers, Banking Records Including Cancelled Checks, Telephone Records,

The warrant concededly encompassed every business record that could be found on the premises, including even records of Statewide Office Supply, a company which shared space with Transnational and whose records the executing officers were orally instructed not to seize.

On appeal, the government concedes that probable cause was lacking to support the full scope of the warrant, but argues that the warrant was sufficiently particularized because it described specific categories of documents. However, even if we were to find that the warrant was sufficiently particularized, the conceded lack of probable cause as to most of the documents seized would render those documents inadmissible unless an exception to the exclusionary rule applied. Accordingly, we will proceed directly to the central question in this case: Whether the exceptions to the exclusionary rule apply to motions for the return of property and the suppression of evidence under Rule 41(e), Fed. R. Crim. P.

I. EXCEPTIONS TO THE EXCLUSIONARY RULE UNDER RULE 41(e)

On a motion to suppress under Rule 12(b)(3), Fed. R. Crim. P., evidence gained as the result of an illegal search and seizure is not excluded at trial if it falls into one of the judicially created exceptions to the exclusionary rule. *See*,

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Correspondence, Mail and Telegram Records, Shipping Records, United Parcel Records, Sales Literature, Contracts, Tape Recordings, Calendars and Diaries, Computer Hardware and Software, Magnetic Media, Floppy Discs, Computer Printouts, Premium Records, Bank Money Order Records, Customer Copy of Bank Money Orders, Premiums in the form of Merchandise, Gift Certificate Records, Cashiers Checks, and other records, evidence and instrumentalities of the crimes of mail fraud, wire fraud, commercial bribery and kickbacks.

e.g., *United States V. Leon*, 468 U.S. 897, 913 (1984) (good-faith exception); *Nix v. Williams*, 467 U.S. 431, 447, (1984) (inevitable-discovery exception); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plain-view exception). The District Judge concluded that such exceptions to the exclusionary rule do not apply to motions made under Rule 41(e) because of the express mandate in Rule 41(e) requiring return and suppression of "illegally seized" evidence.

The District Judge erred in thus imbuing a mere procedural rule with substantive force. The amendment of Rule 41(e) in 1972 clearly indicates that the Rule was not intended to create new substantive grounds for suppressing evidence, but simply to provide a pre-indictment procedure for the return of property and the suppression of evidence in accordance with the substantive rights created by the Constitution or recognized in decisional law. *See Central S. Carolina Chapter, Soc'y of Professional Journalists, Sigma Delta Chi v. United States Dist. Court for the Dist. of S. Carolina*, 551 F.2d 559, 564 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (purpose of Rule 41(e) is to implement the exclusionary rule); *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976) (rule 41(e) codifies the exclusionary rule). Before 1972, Rule 41(e) listed five specific grounds for the return of seized property and the suppression of evidence derived therefrom.[3] The 1972

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3 Before the 1972 amendment, Rule 41(e) read in pertinent part:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4)

amendment eliminated these five grounds and substituted the generic "illegally seized" language of the present rule. The Advisory Committee set forth two reasons for the amendment: " (1) substantive grounds for objecting to illegally obtained evidence (*e.g.*, *Miranda*) are not ordinarily codified in the rules and (2) the categories are not entirely accurate." Notes of Advisory Committee on Rules, 1972 Amendment.

In its discussion of the reasons for the amendment, the Advisory Committee cited with approval *United States v. Howard*, 138 F. Supp. 376, 380 (D. Md. 1956). In *Howard*, the court noted that the five grounds listed in the Rule did not embody the whole law of search and seizure. The court accordingly applied principles of search and seizure law that were not codified in the Rule, implicitly recognizing that the Rule was intended to reflect the substantive law and to follow changes therein. The Advisory Committee's citation of *Howard* in connection with the 1972 amendment is a further indication that the Rule was intended merely to provide an additional procedure to enforce existing substantive rights.

The government argues here, as in the court below, that the Supreme Court's opinion in *United States v. Calandra*, 414 U.S. 338 (1974), confirms this interpretation of Rule 41(e). The District Court, however, distinguished *Calandra* on the basis that *Calandra* merely held that the exclusionary rule does not extend to grand jury proceedings.

Although *Calandra* did so hold, we do not read *Calandra* as narrowly as did the District Court. In *Calandra* the

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there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed.

Supreme Court was reviewing a decision of the Court of Appeals for the Sixth Circuit, which held that Rule 41(e) provides standing to invoke the exclusionary rule in grand jury proceedings. The Supreme Court reversed, stating, "Rule 41(e) . . . does not constitute a statutory expansion of the exclusionary rule." *Id.* at 348 n.6. In the instant case, the District Court's interpretation of Rule 41(e) expanded the exclusionary rule by negating its exceptions. The District Court's interpretation is thus in conflict with that of the Supreme Court in *Calandra*.

Implicit in the District Court's ruling is the assumption that the express textual mandates of the Federal Rules of Criminal Procedure take precedence over the decisional law which created the exclusionary rules.[4] This Court implicitly rejected that principle in *United States v. Matias*, 836 F.2d 744 (2d Cir. 1988). There, the government applied for a telephonic search warrant pursuant to Rule 41(c)(2). Neither the Assistant United States Attorney nor the agent providing the information to the Magistrate was placed under oath, in violation of the specific terms of both the fourth amendment and Rule 41(c)(2)(D). The Court applied the good-faith exception to the exclusionary rule and refused to suppress the evidence. *Id.* at 747. The District Court's reasoning in the present case, applied to the facts in *Matias*, would have dictated that the evidence be suppressed, since the seizure was clearly illegal. Thus, the District Court's holding is in conflict with precedent in this Circuit as well.

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4 As the Supreme Court has stated, the exclusionary rule is " 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' " *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

The District Court found that Congress's failure to amend the "illegally seized" language in Rule 41(e) further supported its conclusion. According to this rationale, if Congress wanted Rule 41(e) to reflect changes in the exclusionary rule, it would have amended the rule to incorporate the exceptions recognized by later Supreme Court cases, such as *Leon* and *Nix*. This argument, however, is a double-edged sword. In the fourteen years since the Supreme Court decided *Calandra*, Congress has not sought to correct the Court's conclusion that Rule 41(e) does not afford broader protection than is provided under the exclusionary rule with its recognized exceptions. From this fact it might be inferred that Congress approved the Supreme Court's interpretation.

The government's argument that the exceptions to the exclusionary rule should apply both to motions under Rule 41(e) and to motions to suppress under Rule 12(b)(3) is supported by common logic as well. Both Rules provide for the suppression of illegally seized evidence—the only significant difference between them being that the former allows either pre-indictment or post-indictment motions while the latter provides only for post-indictment motions. It would be highly incongruous if the success of a post-indictment motion to suppress depended upon which of the two rules was relied upon.

At oral argument, appellees took issue with this analysis. As they pointed out, Rule 41(e) provides that a post-indictment Rule 41(e) motion is to be treated as a Rule 12(b)(3) motion. Under this analysis, the exclusionary rule exceptions would apply to a post-indictment Rule 41(e) motion to the same extent as a Rule 12(b)(3) motion, but the exceptions would not apply to a pre-indictment Rule 41(e) motion. Thus, an unindicted person would have

greater protection under the fourth amendment than one who has been indicted.

Appellees contend that this is a salutary result, and cite a recent case in the District Court of Hawaii which adopted this rationale in holding exceptions to the exclusionary rule inapplicable to Rule 41(e), *see In re Motion for Return of Property*, 681 F. Supp. 677, 684 (D. Hawaii 1988). Although Congress might see fit to provide greater protection to people who are not yet indicted, this would be inconsistent with the presumption of innocence that indicted persons enjoy, and there is nothing in the legislative history to indicate that in enacting Rule 41(e) Congress intended such an anomalous result. Moreover, this Court has already determined that the legality of a seizure should not depend upon whether an indictment has issued at the time the seizure is challenged. *See United States v. Merchant Diamond Group*, 565 F.2d 252, 253 (2d Cir. 1977).

For the foregoing reasons, we conclude that the exceptions to the exclusionary rule apply to motions under Rule 41(e) for the return of property and the suppression of evidence. Accordingly, we reverse this aspect of the District Court's decision.

II. THE GOOD-FAITH EXCEPTION

The good-faith exception to the exclusionary rule, enunciated in the Supreme Court case of *United States v. Leon*, 468 U.S. 897, 913 (1984), provides that evidence seized by officers reasonably relying on a facially valid warrant issued by a detached and neutral magistrate should not be suppressed. The pivotal question is whether "a reasonably well trained officer would have known that the search was

illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23; *United States v. Buck*, 813 F.2d 588, 592 (2d Cir.), *cert. denied*, 108 S.Ct. 167 (1987). In other words, the court must determine whether the officers' reliance on the warrant was objectively reasonable. *Leon*, 468 U.S. at 919, 922 & n.23; *Buck*, 813 F.2d at 592.

In *Leon*, the trial judge found that the executing officers acted in good faith. In the instant case, the District Judge concluded that the good-faith exception did not apply, and therefore made no determination as to the officers' good faith. The record before us is insufficient to enable a determination of whether the officers acted in good faith. Accordingly, we remand to the District Court for findings of fact on this issue. Having so decided, we need devote only the briefest discussion to the remaining issues raised on this appeal.

III. INEVITABLE-DISCOVERY EXCEPTION

The government has also argued that the motion for return of property should have been denied on the basis of the inevitable-discovery exception to the exclusionary rule. Under the doctine of inevitable discovery, evidence that was illegally obtained will not be suppressed "if the government can prove that the evidence would have been obtained inevitably" even if there had been no statutory or constitutional violation. *Nix v. Williams*, 467 U.S. 431, 447 (1984).

The government contends that it inevitably would have discovered the documents under a subpoena that it had issued several months before the search of the premises. The mere fact that the government serves a subpoena, however, does not mean that it will obtain the documents

it requests. A subpoena can be invalid for a variety of reasons, as when it is unduly burdensome, Fed. R. Crim. P. 17(c), when it violates the right against self-incrimination, *United States v. Doe*, 465 U.S. 605, 610-12 (1984), or when it calls for privileged documents. *In re Grand Jury Subpoena Dated Sept. 15, 1983*, 731 F.2d 1032, 1036-37 (2d Cir. 1984). Moreover, we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after service of the subpoena. Thus, the government cannot show that its subpoena would have inevitably resulted in the discovery of the suppressed documents.

IV. THE PLAIN-VIEW EXCEPTION

The government also asserts that the Rule 41(e) motion "should have been denied on the ground that many of the documents seized fell within the plain-view exception. Under this doctrine, officers may seize evidence in plain view if (1) the initial intrusion is justified by a warrant or a recognized exception to the warrant requirement; (2) the evidence is inadvertently discovered; and (3) the incriminating nature of the evidence found is immediately apparent to the officers. *See United States v. $10,000 in U.S. Currency*, 780 F.2d 213, 217 (2d Cir. 1986).

Although a search here was arguably justified in that, as the District Court recognized, there was probable cause to search for some of the documents seized, the inadvertent discovery requirement was not satisfied. It is clear from the extraordinary breadth of the warrant that the officers intended to seize virtually all of appellees' documents. The discovery of documents coming within the terms of the warrant can hardly be deemed inadvertent.

V. CONCLUSION

For the foregoing reasons, the order of the District Court is reversed and the matter remanded for further proceedings consistent with this opinion.

APPENIDX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERBERT ROBERTS, JOAN ROBERTS and LEWIS BROMBERG,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

Misc. No. M 9-150 (RWS)

OPINION

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SWEET, D.J.

This is an application pursuant to Fed.R.Crim.P. 41(e) for the court to unseal an affidavit issued in support of a search warrant and to order the return of documents illegally seized pursuant to the warrant. The motion has been made prior to any indictment. For the reasons set forth below, the application for the return of the documents is granted.

Facts

On May 27, 1986 a team of Postal Inspectors executed a search warrant at 31 East 31st Street, New York, New York. Issued by a federal magistrate,

the warrant identified the target of the search as the "Business Premises of Transnational Supply Warehouse, Inc., dba 'National Supply Warehouse.'" ("Transnational") According to movants, the postal inspectors searched "any and all business records on the premises," including records of entities and individuals whose names do not appear on the warrant. Whether the agents in fact searched or seized every scrap of paper on the premises, they searched a great many. The index to the search is 73 pages long (though many pages list only an item or two), and the government represented at the hearing on the

present motion that so many papers were taken that it was physically impossible for the inspectors to examine individually every single document that they seized. The warrant authorized the seizure of:

Customer Files, Customer Lists, Lead Source Material, Invoices, Purchase Orders, Order Forms, Lead Cards, Sales Pitch Sheets, Price Lists, Cassettes Containing Sales Pitches, Personnel Files, Employment and Payroll Records, Financial Records, Ledgers, Cash Disbursements and Cash Receipts Journals and Ledgers, Banking Records Including Cancelled Checks, Telephone Records, Correspondence, Mail and Telegram Records, Shipping Records, United Parcel Records, Sales Literature, Contracts, Tape Recordings, Calendars and Diaries, Computer Hardware and Software, Magnetic Media, Floppy Discs, Computer Printouts, Premium Records, Bank Money Order Records, Customer Copy of Bank

> Money Orders, Premiums in the form of Merchandise, Gift Certificate Records, Cashiers Checks, and other records, evidence and instrumentalities of the crimes of mail fraud, wire fraud, commercial bribery and kickbacks.

There is no restriction in the warrant on whose documents were subject to seizure, no restriction as to the time period from which the documents must be, and no restriction in terms of any specific transaction to which the documents must be connected. Quite the contrary, at argument the Assistant United States Attorney represented that he could not think of a single office record not covered by the warrant. The affidavit upon whose strength the warrant was issued is sealed.

Herbert Roberts is the president of Statewide Funding Service Co., d/b/a

Statewide Office Supply. Lewis Bromberg is the secretary and vice-president of the same organization. Joan Roberts is the president and sole shareholder of M.I.S.S., Inc. All three have asserted that their companies did business in a storefront at 31 East 31st Street, and that in executing the warrant on May 27, the postal inspectors seized both personal documents and documents of their businesses in violation of the Fourth Amendment. Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, they have asked that the affidavit underlying the warrant be unsealed and/or that their wrongfully seized property be returned to them. Rule 41(e) provides that if the court returns property, the property is automatically excluded as evidence at any future trial or hearing. Thus the

movants' Rule 41 application is also a motion to suppress evidence.

Movants have alleged that the inspectors seized items outside the scope of the warrant, that the warrant did not sufficiently particularize the place to be searched, and that the warrant listed so many objects of a search that the warrant was, in effect, an illegal general warrant.

The government opposes the motion primarily on the grounds that the issue is not ripe for disposition because no indictments have been voted, but it has also briefed the merits.

On October 9, 1986, the motion was argued in Part I of this court. By Memorandum Opinion of October 31, 1986, the court unsealed the affidavit for the limited purpose of in camera examination

by the court, and directed the Assistant United States Attorney to deliver a copy of the affidavit to chambers, which was done on November 17 1986.

Ripeness of the Rule 41(e) Application

The text of Rule 41(e) provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Fed.R.Crim.P.41(e)(1986).

Rule 41(e) thus provides for the piecemeal litigation of issues which attend the initiation of a criminal prosecution. An aggrieved party enjoys a choice under the terms of Rule 41(e) as to when to litigate an alleged illegal seizure: pre-indictment in the district of seizure, or post-indictment in the district of trial (in which case the application is treated as a Rule 12 motion to suppress). There has been no indictment yet in this case, and the property was seized within the Southern District.

In addressing Rule 41(e) exclusion applications over the years, courts have enumerated a number of policy considerations which militate against exclusion of evidence at the pre-

indictment stage. Before an indictment, the court is working with information which is much more rudimentary than that which will be available at a later point in the investigation/prosecution. In general, pre-indictment Rule 41(e) motions are litigated through affidavits, DiBella v. United States, 369 U.S. 121, 129 n.9 (1962), and in keeping with general practice, parties to this action proceeded by affidavit. Even in a pre-indictment Rule 41 application in which there has been a full evidentiary hearing, the court's grasp of the factual context of the events is skeletal compared to the detail with which the court must master the case in its later stages. As the Supreme Court has noted, the legality of a search "too often cannot truly be determined until the evidence at trial

has brought all the circumstances to light." Id. at 129. Thus on a summary hearing of a Rule 41(e) application, "the ruling . . . is likely always to be tentative," id. at 132, and "ordinarily the District Courts will wish to reserve final ruling until the criminal trial," id. at 130 n.9. As one of the objects of the criminal rules "is to have all pretrial motions disposed of in a single court appearance rather than to have a series of pretrial motions made on different dates," Fed.R.Crim.P. 41 (1986) (Commentary to 1972 Amendments), some courts, as a prudential matter, have deferred the Rule 41(e) determination to the court that will try the case. See e.g., In re Grand Jury Proceedings Involving Berkley & Co., 466 F.Supp. 863, 866 (D. Minn. 1979). In doing so, the

courts have also noted that this course reduces the potential for disrupting grand jury proceedings. See In re Sentinel Government Securities, 530 F. Supp. 793, 795-96 (S.D.N.Y. 1982); In re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 866-67 (D. Minn. 1979).

To serve these judicially recognized interests, some district courts have required movants to show "irreparable harm" before a pre-indictment Rule 41(e) application will be granted. See, e.g., In re Sentinel Gov't Sec., 530 F. Supp. 793, 796 (S.D.N.Y.1982) (Haight, J.); In re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 866 (D. Minn. 1979). See also Standard Drywall v. United States, 668 F.2d 156, 157 (2d Cir.), cert. denied, 456 U.S. 927 (1982)

(describing district court's standard but not passing on it). To one court using this standard, the irreparable harm requirement meant that "consideration of the target's Fourth Amendment claims must be deferred to a motion to suppress evidence under Rule 12, 'in the absence of seizure of some unique property or privileged documents' . . ." In re Sentinel Govt. Sec., 530 F. Supp. at 797 (Haight, J.) (quoting Standard Drywall, Inc. v. United States, 668 F.2d 156, 157 n.2 (2d Cir.), cert. denied, 102 S.Ct. 1973 (1982) (dicta)). Following Second Circuit dicta in Standard Drywall, 668 F.2d at 157 n.2, the Sentinel court reasoned that the modern miracle of photocopying prevents there from being irreparable injury when the objects of the contested seizure are non-privileged

documents; The government can duplicate the documents so that it can have copies to proceed in its investigation and the aggrieved party can have copies to continue to conduct its business. Sentinel Gov't Sec., 530 F.Supp at 795.

Since these cases, however, the Supreme Court has spoken plainly on the subject of court's carving exceptions out of the Federal Rules. In discussing judicial modifications that some Circuits had imposed on Fed.R.Civ.P. 15(c), the Court wrote: "We do not have before us a choice between a 'liberal' approach toward [the Rule], on the one hand, and a 'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says."

Schiavone v. Fortune, 106 S.Ct. 2379, 2385 (1985). If true in the civil domain, this principle must surely be true in the criminal as well, in which the general rule is strict construction against the government.

Here the Rule says nothing about delaying decisions for prudential considerations, and nothing about irreparable harm. Rule 41(e) plainly provides for pre-indictment adjudication of the legality of a seizure, and, whether or not this is sound policy of judicial administration, it is not the court's place to "ignor[e] what the Rule provides in plain language." Id. Accepting the Rule as "meaning what it says," id., this is indeed the proper time to pass on the legality of the search.

Rule 41(e)'s Remedy

The government argues that even if the warrant is illegal, the agents' reliance on it falls well within the good faith standard announced in United States v. Leon, 468 U.S. 897 (1984), and Massachusetts v. Sheppard, 468 U.S. 981 (1984), and that, therefore, the evidence at issue should not be suppressed. In making this argument, the government has confused the "judicially implied" constitutional remedy available under the Fourth Amendment, Mapp v. Ohio, 367 U.S. 643, 648 (1961), with the explicit textual remedy available under Rule 41(e). The two are distinct, and this case concerns the latter.

By now it is well established that a violation of the Fourth Amendment is analytically and legally distinct from the award of any remedy for the violation.

Leon. 468 U.S. at 905-06. Gone are the days when it was thought that the exclusionary rule was "a necessary corollary of the Fourth Amendment." Id. Today it is understood that, "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct,'" Id. at 906 (quoting Illinois v. Gates, 462 U.S. 213, 223 (1983)).

The "good faith" exception set out in Leon, and urged on the court here by the Assistant United States Attorney, is a judicially crafted qualification of a judicially fashioned remedy. In contrast, this case concerns a remedy for illegal searches that was explicitly

codified in Rule 41(e) and was left intact by Congress when it later modified another portion of Rule 41. See Fed.R.Crim.P.41 ("Congressional modification of proposed [1977] Amendment"). That is, in applying Rule 41(e), a court is Not making a Fourth Amendment exclusion decision; it is applying a procedural remedy dictated by the Federal Rules.

To apply Rule 41(e), courts must determine whether: "(1) the person is entitled to lawful possession and (2) the seizure was illegal." Fed.R.Crim.P.41 (Commentary to 1972 Amendment) (emphasis in original). The first of the two criteria was provided so that "the judge in the district of seizure does not have to decide the legality of the seizure in cases involving contraband which, even if seized illegally, is not to be

returned." Id. It is a criterion beyond that required in a Fourth Amendment suppression motion brought under Fed.R.Crim.P. 12(b)(3). If the goods in question are not contraband -- and here the government has made no such claim -- then the court proceeds to determine whether the seizure was legal. A seizure in violation of the Fourth Amendment certainly counts as an "illegal" search under the Rule. If both of these criteria are met, then the Rule's remedial procedures are triggered: "the property shall be restored and it shall not be admissible in evidence at any hearing or trial." (emphasis added).

Unquestionably, the remedy that Rule 41(e) provides is more stringent than required by the Constitution as construed in Leon, just as other of the Federal

Criminal Rules are likewise more exacting than the Constitution demands. Rule 16, for instance, provides for more discovery by the defense than is dictated by Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, and failure to comply with the Rule can similarly result in the exclusion of evidence, Fed.R.Crim.P. 16(d)(2). Similarly, Fed.R.Crim.P. 32(3) establishes more exacting standards with regard to the imposition of sentences than does due process. Compare United States v. Inmon, 594 F.2d 352, 354 (3d Cir.) ("Enunciating reasons for a sentence has never been held to be a constitutional requirement."), cert. denied, 444 U.S. 859 (1979) with Fed.R.Crim.P. 32(3)(D)(i) (court must make factual findings concerning alleged factual inaccuracies in PSI's). Thus

Rule 41(e) is but one of many rules which establish stricter criteria and more extensive remedies than the Constitution requires.

The government has offered no authority to require this court to create a good faith exception out of the explicit language chosen by the drafters of Rule 41(e). In an earlier version, Rule 41(e) contained not only specific language about remedies, but also a detailed list of substantive criteria, see Fed.R.Crim.P. 41 (Commentary to 1972 Amendment), which did not reflect the full substance of search and seizure law, see United States v. Howard, 138 F. Supp. 376, 380 (D. Md. 1956) ("I do not understand that [Rule 41(e)] embodies in itself the whole of the law of search and seizure") (emphasis in original) (cited

in commentary to 1972 Amendment). The 1972 Amendment to the Rule replaced the list of substantive criteria with the phrase "illegally seized," a standard which accommodates evolution in the substantive law. But even as they provided for the evolution of the substantive law, the Rule's crafters left intact the precise, mandatory remedial language.

As Professor Wayne LaFave wrote almost ten years ago, "For over half a century now, the validity and efficacy of the Fourth Amendment exclusionary rule have been vigorously debated . . . ." Search and Seizure: A Treatise on the Fourth Amendment 20 (1978); see e.g., Bivens v. Six Unknown Agents, 403 U.S. 388, 411-424 (1971) (Burger, C.J., dissenting). Recent history has proven that the

constitutional remedy of exclusion for violations of the Fourth, Fifth or Sixth Amendments is -- in terms of the normally slow moving world of constitutional law -- extraordinarily doctrinally fluid. See, e.g., United States v. Leon, 468 U.S. 897 (1984) (good faith exception to exclusion remedy); Nix v. Williams, 467 U.S. 431 (1984) (inevitable discovery exception to exclusion remedy); Kastigar v. United States, 406 U.S. 441 (1972) (independent source exception to exclusion remedy). Since 1972, Rule 41 has been amended twice, in 1977 and 1979, and on one of those occasions Congress intervened to change the promulgator's proposals. Considering the continuing heated debate over the exclusionary rule, Rule 41's explicit remedial command must be regarded as a policy decision; the

promulgators knew how to leave terms elastic when they wished to. See, e.g., Fed.R.Crim.P. 41(e) (commentary to 1972 Amendment) (allowing substantive evolution); Fed.R.Crim.P. 12(b)(3) ("Motions to suppress evidence") (elaborating neither substantive nor remedial standards).

Although courts should not construe the Criminal Rules "to have an inflexible meaning irrespective of the circumstances," Fallen v. United States, 378 U.S. 139, 142 (1964), or "ritualistically," C. Wright, 1 Federal Practice and Procedure §32, at 27 (1982), the circumstances surrounding Rule 41(e) show that those promulgating it weighed the alternatives and codified their conclusion. To "accept the Rule as meaning what it says," Schiavone, 106

S.Ct. at 2385, means that if the seizure of documents is illegal, the evidence must be returned and suppressed.

The Particularity of the Warrant

There is simply no issue here about the extraordinary breath of this warrant. At argument, the Assistant United States Attorney represented that he could not think of a single office record not encompassed by this warrant. As already noted, the index of items seized runs 73 pages, including entries such as "misc. folders." By listing every type of record that could conceivably be found in an office, the warrant effectively authorized the inspectors to cart away anything that they could find on the premises.

Apparently even the agents executing the warrant were astonished by its facial

breadth. Postal Inspector Ramon Montero called his superior to ask whether the warrant was meant to cover documents marked "Statewide" as well as those marked "National/Transnational." Inspector Montero was right to be chary; lacking any phrase limiting the target documents to any particular company, the warrant was so broad as to authorize the seizure of anyone's customer files, anyone's cancelled checks, anyone's financial records, and so on, as long as they were found on the named premises. It appears that Montero could not believe what he was reading, and called headquarters to check.

Despite the fact that the warrant authorized the seizure of any company's documents, including Statewide's, Inspector Montero was told by the

inspector he contacted not to seize Statewide documents unless, in Montero's words, "they were so commingled with National/Transnational documents as to render it impossible, as a practical matter to segregate them." The reason for this commingling caveat is readily apparent: at argument the Assistant United States Attorney repesented that so many documents were seized that it was physically impossible to go through every piece of paper as they were being taken.

Petitioners argue that through listing everything that might possibly be found in an office of the eighties -- including, incidentally, even computer hardware, software, and floppy discs -- the government has created a de facto general warrant. See generally United States v. Abrams, 615 F.2d 541 (1st Cir. 1980);

United States v. Roche, 614 F.2d 6 (1st Cir. 1980); In re Lafayette Academy, 610 F.2d 1 (1st Cir. 1979). With no limit as to the owners of the documents, see National City Trading v. United States, 635 F.2d 1020, 1021 (2d Cir. 1980) (warrant limited to "property of National City Trading Corp. and persons associated with it"), no limit as to the dates of the documents to be seized, see United States v. Abrams, 615 F.2d 541 (1st Cir. 1980) (failure to restrict dates of target documents), and no restriction to any specific wrongful transaction to which the documents were related, see Andreson v. Maryland, 427 U.S. 463, 480-81 (1976) (warrant calls only for evidence respecting single fraudulent transaction), the warrant in this case authorized "a general exploratory

rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (quoted in Andreson, 427 U.S. at 480). Common sense shows just how broad this warrant was, as does, of course, the government's concession at argument that there is not a single record which the warrant fails to reach.

As a consequence of its breadth, the warrant violated the cardinal rule of Fourth Amendment law that "[a]s to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927) (quoted in Andreson, 427 U.S. at 480). Here the warrant left much to the Inspectors' discretion, and -- as shown by their own affidavits -- they exercised it; they decided to take only as many of

Statewide's documents as it was physically convenient to do so (those commingled with National/Transnational papers), but no more.

All this notwithstanding, the government has cited a Second Circuit case that stands for the proposition that when a business is "permeated with fraud" virtually all of its business records can be seized. National City Trading Corp. v. United States, 635 F.2d 1020,1026 (2d Cir. 1980). In deciding National City, the Second Circuit cited and relied upon the First Circuit's decision in United States v. Brien, 617 F.2d 299, 309 (1st Cir.), cert. denied sub. nom. Labus v. United States, 446 U.S. 919 (1980), which held "where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of

an enterprise may be seized, if they are . . . accurately described so that the executing officers have no need to exercise their own judgment as to what should be seized." The basic theory at work is that the notion of particularity is closely linked to the extent of the showing of probable cause; if there is probable cause to believe that everything in an office is fraudulent then there is just reason "to cart away all documents." Lafayette Academy, 610 F.2d at 5. The issue, then, is what set of facts establishes that an organization is "permeated with fraud" in the National City Trading Corp. sense.

In National City Trading Corp., 635 F.2d 1020, 1021-22 (2d Cir. 1980), the affidavit underlying the warrant described a scheme in which every

transaction was fraudulent. Although customers were being sold what they though were commodity options, the scheme depended on their never being able to realize any benefit of their bargain. From the telephone sales pitches, to the fraudulent "purchase confirmation slip" sent to each customer after the telephone sale, to the Mailgrams demanding uncalled for payments, to the final deceptions that prevented the few customers who persisted to so late a stage from tendering full purchase price to take delivery of the commodities, the National City Trading racket was nothing but a swindle from beginning to end. Every step of each transaction was a crucial step in the fraud, and it does not appear that National City Trading conducted even a wit of legitimate business. The

swearing officer had himself investigated twenty of the forty or so complaints received from the company's customers, and on at least three separate occasions undercover government agents accompanied victims to negotiations with the company. Each time the company continued to try to defraud the victim.

In United States v. Brien, 617 F.2d at 299, fraud likewise was the enterprise's only business. The offending organization was Lloyd, Carr & Co. ("Lloyd, Carr") which, like National City Trading, sold commodity options through telephone sales. Every sale was made by telephone, with the seller working from a script of misrepresentations. Id. at 303. These oral misrepresentations were followed up by deceptive mailings, and by more calls and more

misrepresentations. Id. at 303-04. Each transaction, therefore, was a cheat from its initiation to its consumation, which the affidavits underpinning the warrant described in detail. One affiant based his description of the racket not only on an analysis of seventy-five customer complaints, but on interviews with twenty former employees, each intimate with the workings of the scam. The affidavit had also seen copies of the telephone scripts, and the fraudulent sales literature and confirmations mailed to customers.

In sum, in both National Trading Corp. and Brien the target enterprises conducted no legitimate activities at all, and every action they took at every stage was designed only to further their fraudulent objectives. In this case, the affidavit is still under seal, but the

court has examined it for the purpose of this application. Although the affidavit indeed establishes probable cause to believe that a number of offenses may have been committed, it does not establish probable cause that every aspect of the enterprise described was so "permeated with fraud," National Trading Corp., 635 F.2d at 1026, as to allow the government "to cart away all documents." Lafayette Academy, 610 F.2d at 5. Because the affidavit is still under seal, the reasons for this conclusion will be filed in a supplementary opinion, which will be sealed for review by the Court of Appeals.

Inevitable Discovery Doctrine

Finally, the government argues that granting the illegality of the search, many of the documents illegally seized were also called for in a Grand Jury

Subpoena issued to Transnational, and, consequently, the seized papers should fall within the "inevitable discovery" doctrine of Nix v. Williams, 467 U.S. 431 (1984). Like the good faith exception, however, the inevitable discovery doctrine is a judicially crafted exception to a judicially crafted remedy for violations of constitutional rights. See Nix, 467 U.S. at 441-44. As already discussed, this case concerns the application of the explicit remedy dictated by a federal rule when certain circumstances trigger it, and thus the exception is not apt.

Particularity as to Place

The offices in question here were all on the first floor of the 13-floor building at 31 East 31st Street. Because the ceilings of the building are high, a

loft had been built within the offices. The movants here have argued that this loft falls outside the scope of the warrant because it is not part of the "first floor." The warrant identifies the office space as being on the first flooor of the apartment building as a whole, and both work floor of the offices and the loft at issue are on the first floor of the building. Consequently, the warrant because it is not part of the "first floor." The warrant identifies the office space as being on the first floor of the apartment building as a whole, and both work floor of the offices and the loft at issue are on the first floor of the building. Consequently, the warrant adequately identifies the place that was searched.

Conclusion

For the reasons set forth above as well as in the sealed supplemental opinion, the seizure pursuant to this warrant was illegal under the terms of Rule 41(e). Probable cause does not exist to seize the items in the extensive list in the warrant, given that the all-inclusive list was not otherwise limited by reference in the warrant to a particular entity, to a particular time frame, or by reference to a particular fraudulent transaction. Like the colonial writs of assistance that inspired the restrictions in the Fourth Amendment, this warrant endowed the government agents with the power to exercise untamed discretion, and, in fact, they exercised it. The mandatory remedial language of Rule 41(e) commands that the property for which the affidavit

does not establish probable cause must be returned.

Consequently, the government is directed to return to movants the property and documents they seek, except for the the following, for which the affidavit does establish probable cause and, hence, which were not seized "illegally:"

1) Material dated between September 19, 1983 and October 26, 1983, relating to National's transaction with George Rice & Sons, or to payments made to Shirley Fong;

2) Material dated in May, 1984 relating to transactions with Harbor Federal Savings and Loan, assn., or to payments made to Sally Travis.

The direction to return the seized property is stayed for thirty (30) days to permit the government to seek review

of this order should it desire to do so. When the thirty days expire, parties are directed to submit proposed orders on notice.

IT IS SO ORDERED.

DATED: New York, New York
March 13, 1987

/s/

ROBERT W. SWEET
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HERBERT ROBERTS, JOAN ROBERTS and LEWIS BROMBERG,

Plaintiffs,

-against- - MEMORANDUM OPINION

UNITED STATES OF AMERICA, Misc. No. M-9-150

Defendant.

----------x

SWEET, D.J.

The government has moved for reargument of the motion granted against it by the court's determination of March 13, 1987. For the reasons set forth below, the motion to reargue is denied.

Prior Proceedings

As set forth in the opinion of March 13, 1987, the petitioners Herbert Roberts, Joan Roberts and Lewis Bromberg (the "Petitioners") sought successfully under Rule

41(e), Fed.R.Cr.P., to compel the return of documents seized during a search by Postal Inspectors on May 27, 1986 at 31 East 31st Street, New York, New York.

Thereafter the government sought and obtained extensions of time to permit the government to seek review of the March 13 order up to June 11, 1987. The instant application was filed on June 15, and opposing memoranda were received on September 3 and 4, 1987.

Reargument is Inappropriate

The government maintains that the March 13 decision "which the Court reached without benefit of briefing on the subject" (Government Memorandum of Law in Support, p.3) overlooked the Leon good faith exception to the exclusionary rule and failed properly to consider United States v. Calandra, 414 U.S. 358 (1974), in particular

the government's argument relating to footnote 6.

A review of the opinion reveals that the government's good faith argument was indeed considered without specific reference to Calandra which had been cited by the government on page 4 of its initial brief. It is principally on its interpretation of Calandra that the government now relies to support its contention that an authority was overlooked.

Certainly, although Calandra had been cited, correctly for the proposition that the illegally seized evidence can be presented to a grand jury (Government's Memorandum of Law in Opposition, p. 4), footnote 6, quoted below, had not been stressed and, therefore, not discussed in the prior opinion. It does not, however, alter the result.

The footnote provides:

> We have recognized that Rule 41(e) is "no broader that the constitutional rule." Alderman v. United States, 394 U.S. 165, 173 n.6 (1969); Jones v. United States, 362 U.S. 257 (1960). Rule 41(e), therefore, does not constitute a statutory expansion of the exclusionary rule.

Calandra, supra, at 349 n.6. From this language the government seeks to read the good faith exception into Rule 41(e), the proposition earlier rejected by this court.

Calandra proceeded without challenging the Rule 41(e) determination which required the return of the seized documents. It dealt with an issue not present here, namely, whether the exclusionary rule barred the use of such documents by the grand jury, and after reviewing the functions and purpose of the grand jury, the court permitted the use of the suppressed documents. Here, the government seeks to use the court's

decision not to extend the exclusionary into a holding that the good faith exception to the exclusionary rule should be extended to Rule 41(e). The government paralogizes, and the argument fails.

Additionally, it must be recalled that Calandra was decided in 1974, at a time when the exclusionary rule had considerably more vitality than it does today. In 1974 there was no good faith exception to the exclusionary rule, nor were there many of the other exceptions the Supreme Court has created. Thus, at that time, even an unexpansive Rule 41(e) would have encompassed the protections granted by this court's March 13, 1987 opinion.

The remaining issues raised by the government were previously considered and rejected. No further reargument is required.

Because the authority allegedly overlooked is inapposite and the remaining authorities were previously considered, no reargument is required. Therefore, the government's motion is denied.

IT IS SO ORDERED.

New York, N.Y.
November 25, 1987

/s/

ROBERT W. SWEET
U.S.D.J.